MOHD ISMAIL SYED MERAH v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
NORDIN HASSAN JCA
HASHIM HAMZAH JCA
[CRIMINAL APPEAL NOS: J-06B-31-07-2020, J-06B-32-07-2020, J-06B(H)-33-07-2020 & J-06A-7-10-2020]
22 MARCH 2022

Abstract – *The discovery and seizure of cash monies amounting to RM1.3 million at the house of an accused who is a police officer earning between RM6,000 and RM8,000 a month and who is not known to have owned any business, coupled with the facts that he has also had dealings with illegal lottery operators, had previously purchased for his personal gain insurance and investments portfolios worth millions of ringgit and had failed to convincingly explain the sources of the monies or take reasonable steps to ascertain that the monies were not proceeds of unlawful activity, have all made his convictions under s. 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 safe and sound. Public interest also demands that a deterrent sentence be imposed; hence, the 4-year concurrent imprisonment sentence without any fine sentence imposed by the High Court on each of the eight charges is set aside, and substituted, effectively and substantively, with 10 years' jail and a fine of RM42 million in default 48 months' jail.*

CRIMINAL LAW: *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 4(1)(a) – Cash monies and jewellery suspected to be proceeds of unlawful activity seized at accused's house – Evidence of illegal gambling operators making payments to accused, a police officer, to protect their business – Whether monies used for accused's investment plans proceeds of unlawful activity – Whether prima facie case established – Standard of proof applicable – Whether accused's defence an afterthought – Whether accused succeeded in raising reasonable doubt on prosecution's case – Whether sentences meted out ought to reflect seriousness of offence – Whether there was special circumstance to grant stay of forfeiture of accused's seized properties*

CRIMINAL LAW: *Sentencing – Offences under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Section 4(1)(a) – Cash monies and jewellery seized at accused's house suspected to be proceeds of unlawful activity – Accused a police officer – Whether public trust betrayed – Whether public interest demands deterrent sentence – Whether there was failure to*

impose fine as required under s. 4(1) – Whether sentences meted out ought to reflect seriousness of offence – Whether there was special circumstance to grant stay of forfeiture of accused's seized properties

The main appeal herein was the appellant's appeal against the conviction and sentence by the High Court for eight offences of money laundering under s. 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA'). Seven charges proffered against the appellant were for using the proceeds of unlawful activities while one charge was for the offence of possession of monies from the proceeds of unlawful activity. The appellant was a police officer with the rank of Deputy Superintendent. From 1 September 2009 until 3 September 2012, the appellant was placed at the Prevention of Gambling, Vice and Gangsterism Division, IPD Batu Pahat. The appellant was then transferred to the Intelligence/Operation Division IPD Batu Pahat. The appellant had also acted as Batu Pahat Head of Criminal Investigation Division in 2013. On 28 December 2015, the appellant was transferred to the Special Task Force on Organised Crime Bukit Aman Kuala Lumpur. Based on information received, a team from the Malaysian Anti-Corruption Agency, headed by SP20, went to the appellant's house where cash monies and jewellery were seized by the team suspected to be proceeds of unlawful activity. The total amount of cash seized by the officers of the Malaysian Anti-Corruption Agency in the appellant's house was RM1,270,366 and Rupiah 8,178,000. The prosecution adduced evidence through SP18 and SP19, operators of illegal gambling businesses around Batu Pahat Johor, that they paid RM3,000 per month to the appellant by placing the money in the appellant's house letterbox for a period of four and three years respectively. The monies were paid to ensure the appellant did not take any action on SP18 and SP19' gambling businesses. Evidence also showed that the appellant or his wife did not own any business or have an account in the CDS Bursa Malaysia. The prosecution also adduced evidence through SP15, an agent of MAA Takaful Berhad, to establish that the monies received from the unlawful activity were used for insurance and investment plans as specified in the first to seventh charges proffered against the appellant. The appellant's defence was essentially that the appellant had never requested or received the monies from SP18 to SP19. The appellant also did not have any knowledge about the monies placed in the letterbox of his house. The appellant denied that he was involved in money laundering activities and testified that the large amount of monies seized from his house was from the following sources (i) a loan of RM3 million from the appellant's friend SD5 from the period of 2005 to 2009; (ii) a loan of RM250,000 from SP26; (iii) the appellant's own money; and (iv) proceeds from the sale of oil palm by the appellant's wife, SD4. Having considered the totality of the evidence in the prosecution case, the High Court Judge ('HCJ') was of the view that the prosecution had proved a *prima facie* case on all the charges against the appellant and

thereafter at the end of the case, found that the defence had failed to raise any reasonable doubt on the prosecution's case. The High Court convicted the appellant on all the charges and sentenced the appellant to four years' imprisonment on each charge and all the sentences to run concurrently. Aggrieved, the appellant appealed. On the other hand, the respondent appealed against the sentence contending that the HCJ erred in handing down concurrent sentences and failed to impose a fine as required under s. 4(1) of the AMLATFA. The Public Prosecutor also appealed against the decision of the High Court in granting the stay of the forfeiture of the appellant's seized property to the Government of Malaysia. The core issues raised by the appellant were (i) that the HCJ had erred in using the standard of proof under AMLATFA; (ii) that the respondent had failed to prove a case on a beyond reasonable doubt against the appellant; (iii) that s. 114(g) of the Evidence Act 1950 applied against the prosecution for the non-calling of SP19's employees; (iv) that the HCJ erroneously referred to the repealed provisions of s. 3(aa) and (bb) of the AMLA; (v) that the charges against the appellant were defective; and (vi) that the appellant had succeeded in raising a reasonable doubt on the prosecution's case.

Held (dismissing appellant's appeals; allowing Public Prosecutor's appeals)

Per Nordin Hassan JCA delivering the judgment of the court:

(1) The finding of the HCJ that the prosecution had proved the element of unlawful activity on the balance of probabilities was correct as in accordance with the provisions of ss. 56(4) and 70(1) of the AMLATFA. Nowhere did the HCJ apply the standard of proof on the balance of probabilities to prove the offence of money laundering under s. 4(1). The proof of unlawful activity *per se* does not prove the offence of money laundering under s. 4(1) of the AMLATFA. The High Court found that the prosecution had proved a *prima facie* case in regard to all the charges proffered against the appellant. The HCJ had directed His Lordship's mind that the standard of proof for the offence of money laundering under s. 4(1) of the AMLATFA was proof beyond reasonable doubt. The HCJ did not err in the application of the standard of proof in the present case. (paras 32-36)

(2) The gravamen of the charges was the using of the proceeds of unlawful activity and the possession of the proceeds of unlawful activity by the appellant, which constituted offences of money laundering under s. 4(1)(a) of the AMLATFA. The prosecution's main witnesses to prove the proceeds of unlawful activity received by the appellant were SP18 and SP19. SP18 and SP19 testified that they had paid the appellant RM3,000 per month and sometimes every two months for years, by putting the monies in the appellant's letterbox, to ensure that no action was taken against their illegal gambling business. The position held by

A the appellant from 2009 to 2015, that was in charge, *inter alia*, of the prevention of gambling and criminal investigation in IPD Batu Pahat coincided with the period of the payments of monies made by SP18 and SP19 to the appellant. Payments were stopped when the appellant was transferred to Bukit Aman Kuala Lumpur in 2015. This supported the B evidence of SP18 and SP19 that the payments were to ensure that no action was taken by the police against both SP18 and SP19's illegal gambling business as the appellant was in a position to do so. (paras 41, 44-46 & 49)

(3) The next significant piece of evidence was the discovery and seizure of C cash monies by officers of the Malaysian Anti-Corruption Agency in the total amount of RM1,270,366 and Rupiah 8,178,000 in several plastic bags and boxes found in the closet of the appellant's master bedroom and the house. Taking into account that the appellant's monthly income as a police officer at the material time was about RM6,000 to RM8,000 D and the appellant had no other business or played shares with Bursa Malaysia, it was a reasonable inference that the monies found in the appellant's house were monies among others, from SP18 and SP19. (para 50)

(4) The HCJ was correct in his finding that the monies seized in the E appellant's house which was the basis of the eighth charge, and the monies used to buy insurance and investment plan as stipulated in the first to seventh charges were proceeds of unlawful activity. SP15 had given detailed particulars about the insurance and investment plan made by the appellant involving a large sum of money which was paid cash F by the appellant. The dates the appellant bought the insurance and the investment plan as stated in the charges were dates after SP18 and SP19 started paying the bribe monies to the appellant which was in 2009 until 2015. This showed the connection between the monies from the unlawful activity and the insurance and investment plan buying. G (paras 51 & 52)

(5) An inference could also be made, as provided under s. 4(2)(a) of the AMLATFA, that in the objective factual circumstances of the present case, the appellant knew that the monies in the house and which were used for the insurance plan and investment were proceeds of unlawful H activity. Further, the appellant without reasonable excuse had failed to take reasonable steps to ascertain that the monies were not proceeds of unlawful activity as envisaged under s. 4(2)(b) of the AMLATFA. In connection to this, the reference to the repealed s. 3(aa) and (bb) by the HCJ does not prejudice or cause any miscarriage of justice to the I appellant as in substance, s. 4(2)(a) and (b) which was applicable at the material time, is similar with the repealed s. 3(aa) and (bb). (paras 53 & 54)

(6) As for the appellant's defence that the RM3 million loan was from SD5, the facts revealed that this big sum of the loan was without any security or interest and the loan agreement was signed eight years after the purported oral agreement of the said loan and after two months the appellant was charged in court for the present case. Further, the loan was given by SD5 between 2005 to 2009 but the investment with MAA Takaful was made from 2014 to 2017 which was eight years after the loan was given to the appellant. As such, this defence was an afterthought. It was also unreasonable for SP26 to give a loan of RM250,000 to the appellant by withdrawing his EPF monies just because he was afraid that the appellant, as a police officer, may cause problems to him. As cash monies of RM1,270,366 and Rupiah 8,178,000 were found and seized from the appellant's house, the defence that the monies include the appellant's own money and the proceeds of the sale of palm oil in the sum of RM100,000 did not support the appellant's defence that the monies seized were not proceeds of unlawful activity. Firstly, the appellant's salary as a police officer was only about RM6,000 to RM8,000 per month and paid into his account. As such, it was difficult to imagine that the appellant could accumulate a large sum of money in cash and placed it in several plastic bags and boxes in his closet. Further, the receipt for the sale of the palm oil shown in court was only in the sum of RM11,655.95. Thus, it did not explain a large amount of cash monies in the appellant's house. In the circumstances and on the totality of the evidence, the defence had failed to raise any reasonable doubt on the prosecution's case, and consequently, the prosecution had proved its case beyond a reasonable doubt. (paras 60-63 & 65)

(7) The charges against the appellant concerned the offences of money laundering under s. 4(1) of the AMLATFA. The ingredients of the offences are the use of the proceeds of unlawful activity as for the first to seventh charges and the possession of the proceeds of the unlawful activity for the eighth charge. In this regard, all the required ingredients of the offences were stated in the charges. Thus, there was no omission of particulars in the charges as contended by the appellant. The requirements under ss. 152 and 154 of the Criminal Procedure Code had been complied with. Further, even if there was an error or omission in the charges, perusing the defence forwarded by the appellant in this case, it was not shown that the appellant was misled by the charges proffered against him. (paras 68 & 69)

(8) The evidence of SP19 revealed that besides himself, sometimes the payments of RM3,000 to the appellant were placed in the appellant's house letterbox by his workers. Here, what was important was that

payments of monies had been made to the appellant to ensure no action was taken against the illegal gambling activity operated by SP19. This fact was established by the evidence of SP18 and SP19. Thus, the ingredient of proceeds of unlawful activity had been proved by the prosecution and there was no gap in the prosecution's case. Therefore, s. 114(g) was not applicable against the prosecution based on facts in the present case. The convictions of the appellant for all the charges were safe. (paras 73 & 74)

(9) The appellant, a police officer, who was entrusted to uphold the law, had betrayed the trust expected of him and protected illegal gambling operators in consideration for bribe monies. Public interest demands the appellant's conduct to be put to a stop, in order to gain the public trust. This could be achieved by a deterrent sentence, not only as a lesson to the appellant but also for others, especially enforcement officers, not to commit the same offence. Applying the one transaction rule, the first and second charges, where both offences were committed on 4 September 2014 and the third and fourth charges where the offences were committed on 16 December 2014, fulfilled the requirement of the proximity of time to be considered as the same transaction. However, the rest of the charges were committed on different times and as such without the essential elements of the proximity of time. Further, the High Court erred in failing to impose any fine as required under s. 4(1) of the AMLATFA. The fine to be imposed pursuant to this provision was not less than five times the value of the proceeds of the unlawful activity or instrumentalities of the offence or RM5 million, whichever was the higher. Having considered all factors in the present case, including the principles of sentencing, this court substituted the sentences imposed by the High Court. The totality of the sentences meted out against the appellant, some to run concurrently and some to run consecutively of each other, reflected the seriousness of the offences committed by the appellant. There was also no special circumstance for the High Court to grant the stay of forfeiture of the appellant's seized property. (paras 83, 86, 87, 89, 92, 94 & 95)

Case(s) referred to:

Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***

Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***

Christopher Khoo Ewe Cheng v. PP [1998] 3 CLJ 705 CA ***(refd)***

Mohd Khir Toyo v. PP [2015] 8 CLJ 769 FC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***

Noor Ismahanum Mohd Ismail v. PP [2018] 10 CLJ 597 CA ***(refd)***

PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***

Raqeem Rizqin Enterprise & Yang Lain lwn. Ketua Polis Negara & Satu Lagi [2019] 8 CLJ 41 FC ***(refd)***

Legislation referred to:
Anti-Money Laundering Act 2001, s. 3(aa), (bb)*
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 4(1)(a), (2)(a), (b), (3), (4), 55(2), 56(4)(c), 70(1), (2)
Criminal Procedure Code, ss. 152, 154, 156
Evidence Act 1950, s. 114(g)
Malaysian Anti-Corruption Commission Act 2009, ss. 17(a), 24

(Criminal Appeal Nos: J-06B-31-07-2020, J-06B-32-07-2020 & J-06B(H)-33-07-2020)
For the prosecution - Mohd Dasuki Mokhtar, Mohd Fairuz Johari & Hanim Mohd Rashid; DPPs
For the accused - Wan Azmil Wan Majid, Nurul Atiqah Mohd Isa & Emylia Atan; M/s Hafarizam Wan & Aisha Mubarak

(Criminal Appeal No: J-06A-7-10-2020)
For the prosecution - Mohd Dasuki Mokhtar, Mohd Fairuz Johari & Hanim Mohd Rashid; DPPs
For the accused - Mohd Baharuddin Ahmad Kassim; M/s Bahar Rusnan & Assocs

** [Editor's note: s. 3(aa) & (bb) under the interpretation of the Anti-Money Laundering Act 2001 has been deleted by s. 4 of the Anti-Money Laundering and Anti-Terrorism Financing (Amendment) Act 2014 (Act A1467) that deleted the definition of 'money laundering']*

[Editor's note: For the High Court judgment, please see Mohd Ismail Syed Merah lwn. PP [2020] 1 LNS 1360 (affirmed in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nordin Hassan JCA:

[1] There are four appeals before us in the present case which are as follows:

(i) Appeal No. J-06A-7-2020 is an appeal by the Public Prosecutor against the decision of the High Court in granting the stay of the forfeiture of the appellant's seized property to the Government of Malaysia;

(ii) Appeal No. J-06B-31-07-2020 is an appeal by Mohd Ismail bin Syed Merah against the order of the High Court in granting the forfeiture order of the appellant's seized property to the Government of Malaysia;

(iii) Appeal No. J-06B-32-07-2020 is the appeal by Mohd Ismail bin Syed Merah against the conviction and sentence by the High Court; and

(iv) Appeal No. J-06B(H)-33-07-2020 is the Public Prosecutor's appeal against the sentence.

[2] The main appeal here is the appeal by Mohd Ismail bin Syed Merah ("the appellant") against the conviction and sentence by the High Court for eight offences of money laundering under s. 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("the AMLATFA"). Seven charges proffered against the appellant were for using the proceeds of unlawful activities whilst one charge was for offence of possession of monies from the proceeds of unlawful activity.

[3] The charges against the appellant are as follows:

First charge (Pertuduhan Pertama)

Bahawa kamu pada 4 September 2014 di MAA Takaful Berhad di No. 58 dan 60, Susur 1, Jalan Tun Razak, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram iaitu menggunakan wang hasil daripada aktiviti haram** sebanyak RM10,143.37 melalui pembelian pelan perlindungan insurans Takafulife 100 nombor sijil 141567199 yang didaftarkan atas nama kamu yang diuruskan oleh Faizah binti Abd Hamid iaitu agen MAA Takaful Berhad dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktivit Haram 2001 [Akta 613] dan boleh dihukum di bawah Akta yang sama.

Second charge (Pertuduhan Kedua)

Bahawa kamu pada 4 September 2014 di MAA Takaful Berhad di No 58 dan 60, Susur 1, Jalan Tun Razak, di dalam-daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram iaitu menggunakan wang hasil daripada aktiviti haram** sebanyak RM40,000.00 di dalam pelaburan Pelan Takafulink Single Invest bernombor sijil Z141567364 yang didaftarkan atas nama kamu yang diuruskan oleh Faizah binti Abd Hamid iaitu agen MAA Takaful Berhad dan oleh itu kamu telah melakukan satu kesalahan di bawah Seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Akta yang sama.

Third charge (Pertuduhan Ketiga)

Bahawa kamu pada 16 Disember 2014 di MAA Takaful Berhad di No 58 dan 60, Susur 1, Jalan Tun Razak, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram iaitu menggunakan wang hasil daripada aktiviti haram** sebanyak RM6,283.09 melalui pembelian pelan perlindungan lnsurans Takafulife 200 nombor sijil 2141759033 yang didaftarkan atas nama anak kandung kamu iaitu Nur Aqilah binti Mohd Ismail yang diuruskan oleh Faizah binti Abd Hamid iaitu agen MAA Takaful Berhad dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Akta yang sama.

Fourth charge (Pertuduhan Keempat)

Bahawa kamu pada 16 Disember 2014 di MAA Takaful Berhad di No 58 dan 60, Susur 1, Jalan Tun Razak, di dalam daerah Johor Bahru, di dalam Negeri Johar Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram iaitu menggunakan wang hasil daripada aktiviti haram** sebanyak RM993,716.91 di dalam pelan Takafulife 100 No Sijil 2141567199 yang didaftarkan atas nama kamu yang diuruskan oleh Faizah binti Abd Hamid iaitu agen MAA Takaful Berhad dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Seksyen 4(1) Akta yang sama.

Fifth charge (Pertuduhan Kelima)

Bahawa kamu pada 26 Febuari 2015 di MAA Takaful Berhad di No 58 dan 60, Susur 1, Jalan Tun Razak, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram** iaitu menggunakan wang hasil daripada aktiviti haram sebanyak RM500,000.00 di dalam pelaburan Pelan Takafulife 200 nombor sijil 2141759033 yang didaftarkan atas nama kamu yang diuruskan oleh Faizah binti Abd Hamid iaitu agen MAA Takaful Berhad dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Seksyen 4(1) Akta yang sama.

Sixth charge (Pertuduhan Keenam)

Bahawa kamu pada 8 Oktober 2015 di RHB Bank Berhad Cawangan Batu Pahat di No 89, Jalan Rahmat di dalam Daerah Batu Pahat, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam pengubahan wang haram berjumlah RM499,620.00 hasil daripada aktiviti haram** dengan menggunakan akaun bank pihak ketiga iaitu akaun RHB Bank Berhad bernombor 10100601048470 milik Tan Kim Tee (KIP: 580627-01-5737) dan oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Seksyen 4(1) Akta yang sama.

Seventh charge (Pertuduhan Ketujuh)

Bahawa kamu pada 28 Disember 2015 di CIMB Bank Berhad Cawangan Batu Pahat di No. 39A, Jalan Rahmat, di dalam Daerah Batu Pahat, di dalam Negeri Johor Darul Takzim, **telah melibatkan diri dalam penggubahan wang haram berjumlah RM29,950.00 hasil daripada aktiviti haram** dengan menggunakan akaun bank pihak ketiga iaitu akaun CIMB Bank Berhad bernombor 8005833841 milik Tan Kim Tee (KIP: 580627-01-5737) dan oleh dengan itu kamu telah melakukan satu

kesalahan di bawah Seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Seksyen 4(1) Akta yang sama.

Eighth charge (Pertuduhan kelapan)

Bahawa kamu pada 18 Januari 2017 di No 11, Jalan Suria 4, Taman Suria, di dalam Daerah Simpang Renggam, di dalam Negeri Johor Darul Takzim, **telah memiliki wang tunai hasil daripada aktiviti haram** sebanyak RM1,270,366.00 dan Rupiah 8,178,000.00 oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 [Akta 613] dan boleh dihukum di bawah Akta yang sama. (emphasis added)

[4] On 30 January 2019, at the end of the defence case, the Sessions Court Judge acquitted and discharged the appellant from all the charges proffered against him. On appeal by the respondent, the High Court convicted the appellant on all the charges and sentenced the appellant to four years imprisonment on each charge and all the sentences to run concurrently. Aggrieved with the decision of the High Court, the appellant appealed against the said decision. On the other hand, the respondent appealed against the sentence contending that the High Court Judge erred in handing down concurrent sentences and failed to impose a fine as required under s. 4(1) of AMLATFA.

The Background Facts

[5] At the material time, the appellant was a police officer with the rank of Deputy Superintendent at Ibu Pejabat Polis Daerah ("IPD") Batu Pahat, Johor. From 1 September 2009 until 3 September 2012, the appellant was placed at the Prevention of Gambling, Vice and Gangsterism Division, IPD Batu Pahat. The appellant was then transferred to the Intelligence/Operation Division, IPD Batu Pahat. The appellant also had acted as Batu Pahat Head of Criminal Investigation Division from 5 April 2013 until 31 May 2013 and 3 June 2013 until 30 June 2013. On 28 December 2015, the appellant was transferred to the Special Task Force on Organised Crime, Bukit Aman, Kuala Lumpur. The appellant's monthly income as a police officer from 2009 to 2015 was between RM6,000 to RM8,000.

[6] Briefly, based on information received, on 18 January 2016, a team from the Malaysian Anti-Corruption Agency, headed by SP20, went to the appellant's house at No. 11, Jalan Suria 4, Taman Suria, Simpang Renggam, Johor. In the house, cash monies and jewellery were seized by the team suspected to be proceeds of unlawful activity. The items seized were as follows:

(i) RM405,1000 cash, in a box handed to SP22 by SD4, the appellant's wife;

(ii) RM17,100 cash, in a yellow/silver plastic bag, found in the master bedroom closet;

(iii) RM17,672 cash, in a white/orange plastic bag, found in the master bedroom closet;

(iv) RM36,332 cash, in a rubbish plastic bag found in the master bedroom closet;

(v) RM65,030 cash, in a black plastic bag, found in the master bedroom closet;

(vi) RM155,952 and Rupiah 8,178,000 cash, in a green/blue paper bag, found in the master bedroom closet;

(vii) RM113,150 cash, in a grey box, found in the master bedroom closet;

(viii) RM150,000 cash, in a Camel Active box, found in the master bedroom closet;

(ix) RM300,000 cash, in a yellow Astro Digital Multimedia Terminal box, found in the master bedroom closet;

(x) RM2,800 cash and jewellery in a blue bag, found in the master bedroom closet.

[7] The total amount of cash seized by the officers of the Malaysian Anti-Corruption Agency in the appellant's house was RM1,270,366 and Rupiah 8,178,000.

[8] The prosecution had adduced evidence through SP18 and SP19, operators of illegal gambling businesses around Batu Pahat, Johor that they paid RM3,000 per month to the appellant by placing the money in the appellant's house letterbox for a period of four and three years respectively. The monies were paid to ensure the appellant did not take any action on SP18's and SP19's illegal gambling businesses. SP18 made the monthly payment to the appellant since 2009 and SP19 was involved in the illegal gambling business from 2006 until 2015.

[9] Evidence also showed that the appellant or his wife did not own any business or have an account in the CDS Bursa Malaysia.

[10] The prosecution also adduced evidence through Faizah binti Abdul Hamid (SP15), an agent of MAA Takaful Berhad, to establish that the monies received from the unlawful activity were used for insurance and investment plan as specified in the first to seventh charges proffered against the appellant.

[11] The appellant's defence essentially that the appellant had never requested or received the monies from SP18 or SP19. The appellant also did not have any knowledge about the monies placed in the letterbox of his house. The appellant denies that he was involved in money laundering activities and testified that the large amount of monies seized from his house was from the following sources:

(i) a loan of RM3 million from the appellant's friend, Dato' Philip Wong Chee Keong (SD5) from the period of 2005 to 2009;

(ii) a loan of RM250,000 from SP26;

(iii) the appellant's own money; and

(iv) proceeds from the sale of oil palm by the appellant's wife, SD4.

[12] Having considered the totality of the evidence in the prosecution case, the High Court Judge was of the view that the prosecution had proved a *prima facie* case on all the charges against the appellant and thereafter, at the end of the case, found that the defence had failed to raise any reasonable doubt in the prosecution case.

[13] In arriving at his decision that the defence had failed to raise any reasonable doubt, the High Court Judge *inter alia* takes into account that the loan agreement (D54), for the sum of RM3,000,000 was only made after the appellant was charged in court and eight years after the oral agreement of the said loan. The loan was also without any security or interest and the appellant had no experience in the investment field to be given a large sum of money for that purpose. Thus, the High Court Judge opined that the loan by SD5 was an afterthought to save the appellant.

The Issues That Were Raised By The Appellant

[14] The core issues raised by the appellant before this court were as follows:

(i) that the High Court Judge had erred in using the standard of proof under AMLATFA;

(ii) that the respondent had failed to prove a case on a beyond reasonable doubt against the appellant;

(iii) that s. 114(g) of the Evidence Act 1950 applies against the prosecution for non-calling of SP19's employees;

(iv) that the High Court Judge erroneously referred to the repealed provisions of ss. 3(aa) and (bb) of AMLA;

(v) that the charges against the appellant were defective;

(vi) that the appellant had succeeded in raising a reasonable doubt in the prosecution case.

The Relevant Law

[15] To begin with, as clearly stated in the preamble of AMLATFA, the objective of AMLATFA is "to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence, and for matters incidental thereto and connected therewith."

[16] The offence of money laundering and its penalty is provided under s. 4(1) which states:

> 4(1) Any person who:
>
> (a) *engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity* or instrumentalities of an offence;
>
> (b) acquires, *receives, possesses,* disguises, transfers, converts, exchanges, carries, disposes of or *uses proceeds of an unlawful activity* or instrumentalities of an offence;
>
> (c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,
>
> *commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.* (emphasis added)

[17] "Unlawful activity" is then defined under s. 3 of AMLATFA as follows:

> (a) **any activity which constitutes any serious offence** or any foreign serious offence; or
>
> (b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,
>
> **regardless whether such activity, wholly or partly, takes place within or outside Malaysia;** (emphasis added)

[18] Next, "serious offence" is defined under s. 3 as follows:

"serious offence" means:

(a) **any of the offences specified in the Second Schedule;**

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences; (emphasis added)

[19] For the purpose of the present case, receiving or obtaining gratification or corrupt money is an offence under s. 17(a) of the Malaysian Anti-Corruption Commission Act 2009 and is a "serious offence" under the Second Schedule of the AMLATFA.

[20] Further, "proceeds of an unlawful activity" is defined under s. 3 in the following words:

"proceeds of an unlawful activity" means any property, or any economic advantage or economic gain from such property, within or outside Malaysia:

(a) which is **wholly or partly:**

(i) **derived or obtained, directly or indirectly, by any person from any unlawful activity;**

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a)(i), (ii) or (iii); (emphasis added)

[21] Another important provision in AMLATFA is s. 4(2), where for the offence under s. 4(1), an inference may be made from any objective factual circumstances stipulated in s. 4(2) which is as follows:

(2) For the purposes of subsection (1), **it may be inferred from any objective factual circumstances that:**

(a) **the person knows, has reason to believe, or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence;** or

(b) **the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.**

(emphasis added)

[22] Section 4(2)(a) and (b) replaced the former s. 3(aa) and (bb) of the AMLA, but the substance is the same, and these provisions, enacted by Parliament are to assist the detection of illegal proceeds from unlawful activity. This is also explained in the case of *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845 where Abang Iskandar JCA (as His Lordship then was, now CJSS) said this:

> [35] As was alluded to earlier, it is immaterial that he, or for that matter anyone, is not convicted for the predicate serious offence. It is money laundering, for example, if he engages in any manner involving proceeds of an unlawful activity if he, without reasonable excuse, fails to take steps to ascertain whether or not the property is the proceeds of an unlawful activity. *The law recognises the difficulty that the investigation may face in absolutely establishing the direct nexus between the accused and the illegal proceeds from the unlawful activity. That was the reason as to why the definition of money laundering has been couched in the manner that appears under s. 3 of the AMLATFA in which para. (aa) imputes knowledge of the proceeds being from an unlawful activity viewed from an objective factual circumstance, and under para. (bb) in respect of a natural person, his conduct, where he had without reasonable excuse failed to take steps to ascertain that the monies are not proceeds of an unlawful activity, namely a duty is cast on him to take steps to ascertain the nature of the proceeds, in terms of their lawfulness or legitimacy. With respect, we agree with the learned deputy on this issue on the true effect of paras. (aa) and (bb) being the men's rea element in the definition of money laundering under s. 3 of the AMLATFA.* (emphasis added)

[23] Section 4(3) of AMLATFA further provides as follows:

> (3) For the purposes of any proceedings under this Act,
>
> **where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.** (emphasis added)

[24] The provision of s. 4(3) is plain and clear which need no other interpretation and was cited by the Federal Court in *Raqeem Rizqin Enterprise & Yang Lain lwn. Ketua Polis Negara & Satu Lagi* [2019] 8 CLJ 41 where Mohd Zawawi Salleh FCJ had this to say:

> [30] Di samping itu, **jika hasil daripada aktiviti haram diperolehi daripada satu atau lebih aktiviti haram, hasil itu tidak perlu dibuktikan sebagai diperolehi daripada mana-mana aktiviti haram tertentu** (lihat sub-s. 4(3); *HKSAR v. Yeung Ka Sing Carson* [2016] JKEC 1506). (emphasis added)

[25] For completeness, s. 4(4) provides that a person may be convicted for an offence under s. 4(1) for money laundering even there is no conviction in respect of the serious offence. The provision states:

A (4) A person may be convicted of an offence under subsection (1) **irrespective of whether there is a conviction in respect of a serious offence** or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

(emphasis added)

B **The Issues For Determination Of This Court**

Whether The High Court Judge Had Erred In Using The Standard Of Proof Under AMLATFA

[26] On this issue, counsel for the appellant submitted that the High Court Judge erred in law in making a finding of fact that the burden of proof for a charge under s. 4(1) of AMLATFA is on a balance of probabilities and not a beyond reasonable doubt.

C

[27] In this regard, the relevant provisions under AMLATFA are s. 56(4) and s. 70 which provide:

D **Section 56(4)**

(4) **In determining whether the property is:**

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

E (b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence, **the court shall apply the standard of proof required in civil proceedings.**

F **Section 70**

Standard of proof

70(1) **Any question of fact to be decided by a court in proceedings under this Act shall be decided on the balance of probabilities.**

G (2) **Subsection (1) shall not apply in relation to any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act** or any subsidiary legislation under it.

(emphasis added)

[28] Section 56(4)(c) above-mentioned provides that the standard of proof H to establish the proceeds of unlawful activity is only on the balance of probabilities but to prove an offence under AMLATFA, including money laundering under s. 4(1), and in light of s. 70(2), the standard of proof is still beyond a reasonable doubt.

[29] This court in the case of *Noor Ismahanum Mohd Ismail v. PP* [2018] 10 I CLJ 597 had addressed this issue as follows:

[17] *In determining whether the property is "the proceeds of an unlawful activity", the standard of proof to be applied by the judge is the civil standard of proof, ie*, proof on the balance of probabilities, as stipulated by ss. 56(4) and 70(1). *This standard of proof must not be mistaken for proof beyond reasonable doubt, which is the heavier standard of proof that the Public Prosecutor is required to discharge in order to bring home a criminal charge against any person, such as a charge under s. 4(1)(a) of the AMLATFA.* (emphasis added)

[30] Reverting to the present case, a perusal of the High Court grounds of judgment is pertinent to determine the burden of proof applied by the High Court Judge.

[31] In paras. 16 and 17 of the grounds of judgment, the High Court Judge said as follows:

[16] Mahkamah ini bersetuju dengan hujahan Timbalan Pendakwa Raya [TPR] yang terpelajar iaitu di akhir kes pendakwaan, disamping kes *prima facie,* **pendakwaan perlu membuktikan "aktiviti haram" atas imbangan kebarangkalian"**

[17] **Mahkamah ini berpendapat atas imbangan kebarangkalian, pendakwaan telah membuktikan penglibatan Responden dalam "aktiviti haram"** yang menjadi teras kesalahan di bawah s. 4(1)(a) Akta itu. Responden ketika itu memegang jawatan Pegawai Turus Cawangan D7, IPD Batu Pahat, Johor terlibat dalam operasi dan risikan kes-kes melibatkan kongsi gelap/perjudian dan maksiat di dalam pentadbiran IPD Batu Pahat. (emphasis added)

[32] In this regard, the finding of the High Court Judge that the prosecution had proved the element of unlawful activity on the balance of probabilities is correct as in accordance with the provisions of s. 56(4)(c) and s. 70(1) of the AMLATFA. Nowhere under the above-mentioned paragraphs, the High Court Judge applies the standard of proof on the balance of probabilities to prove the offence of money laundering under s. 4(1). It must be emphasised here that the proof of unlawful activity *per se* does not prove the offence of money laundering under s. 4(1) of the AMLATFA.

[33] Having analysed all available evidence, the High Court Judge found that the prosecution had proved a *prima facie* case in regard to all the charges proffered against the appellant. The Sessions Court Judge made a similar finding when he called the appellant to enter his defence on all the charges.

[34] Further, in paras. 90 and 99 of the grounds of judgment, the High Court Judge had this to say:

[90] Mahkamah ini berpendapat sebaik Tuan HMS itu memutuskan pendakwaan membuktikan kes *prima facie* atas semua pertuduhan, **Responden mempunyai tugas untuk menimbulkan keraguan yang munasabah atas kes pendakwaan melibatkan kesalahan di bawah s. 4(1)(a) Akta itu.**

A [99] … Sebaik Tuan HMS itu memutuskan pendakwaan membuktikan kes *prima facie* atas semua pertuduhan di bawah s. 4(1)(a) itu, Tuan HMS itu gagal menimbangkan pembelaan Responden Bersama keterangan kes pendakwaan. Mahkamah ini berpendapat pembelaan Responden bersifat penafian semata-mata berkaitan aktiviti hasil haram yang menjadi teras pertuduhan. **Pembelaan gagal menimbulkan sebarang keraguan yang**
B **munasabah atas semua pertuduhan.** (emphasis added)

[35] From the reading of the above-mentioned paragraphs, it is our view that the High Court Judge had directed His Lordship's mind that the standard of proof for the offence of money laundering under s. 4(1) of AMLATFA is proof beyond a reasonable doubt. The sentence "Pembelaan gagal
C menimbulkan sebarang keraguan yang munasabah atas semua pertuduhan" used by the High Court Judge would entail the fact that the prosecution had proved its case beyond a reasonable doubt on all the charges.

[36] In the circumstances, we find the High Court Judge did not err in the
D application of the standard of proof in the present case.

Whether The Respondent Had Proved A Case On A Beyond Reasonable Doubt Against The Appellant And Whether The Appellant Had Raised A Reasonable Doubt In The Prosecution Case

[37] In the present case, the first to seventh charges against the appellant
E are for the offence of using the proceeds of unlawful activity, and the eighth charge is for the offence of in possession of proceeds of unlawful activity. The detailed particulars of the offences are stipulated in those charges.

[38] In this regard, the elements to be proved by the prosecution are the
F appellant had used the monies from the unlawful activity for the first to seventh charges and in possession of the proceeds of unlawful activity for the eighth charge.

[39] Further, the court could make an inference from the objective factual circumstances that the appellant knows or has reason to believe, that the
G monies were proceeds from any unlawful activity or the appellant without reasonable excuse fails to take steps to ascertain whether or not the monies were proceeds from unlawful activity. This is provided under ss. 4(2)(a) and (b) of AMLATFA.

[40] The law was emphasised by the Federal Court in *Raqeem Rizqin*
H *Enterprise* (*supra*) where this was said:

[29] *Pihak pendakwaan tidak perlu membuktikan pengetahuan sebenar* ("actual knowledge") *bagi mensabitkan seseorang dengan kesalahan penggubahan wang haram.* Subseksyen 4(1) memperuntukkan bahawa bagi membuktikan kesalahan pengubahan wang haram, *kesimpulan bolehlah dibuat daripada*
I *mana-mana keadaan hakikat objektif bahawa orang itu:*

(a) mempunyai sebab untuk mempercayai atau mempunyai syak yang munasabah bahawa harta itu ialah hasil daripada aktiviti haram atau peralatan kesalahan; atau

(b) tanpa alasan yang munasabah tidak mengambil langkah yang munasabah untuk menentukan sama ada atau tidak harta itu ialah hasil daripada aktiviti haram atau peralatan kesalahan. (emphasis added)

[41] Here, the gravamen of the charges are the using of the proceeds of unlawful activity and the possession of the proceeds of unlawful activity by the appellant which constitute offences of money laundering under s. 4(1)(a) of AMLATFA.

[42] This court in *Azmi Osman v. PP* [2014] 6 CLJ 110 dealt with the elements to be proved by the prosecution for an offence under s. 4(1) of AMLATFA in the following manner:

[26] *To constitute an offence under s. 4(1) of the Act* the prosecution must therefore prove the following elements against the accused:

(a) the accused has *received or used* (according to the charge) the monies (first element);

(b) *The monies received or used are the proceeds of an unlawful activity* (second element). To prove the proceeds of an unlawful activity, the prosecution must prove the commission of a serious offence known as the predicate offence specified in the Second Schedule and the monies specified in the charges are the proceeds of the serious offence. It is to be noted that s. 4(2) allows a person to be convicted of money laundering offence irrespective of whether or not he has been convicted of the offence that generated the money (the predicated offence under Schedule 2 of the Act);

(c) Once the above elements are proven, *it could be inferred from the objective factual circumstance that the accused knows or has reason to believe, that the monies are the proceeds from any unlawful activity or in respect of the conduct of a natural person, the accused without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from an unlawful activity (third element).* (emphasis added)

[43] We need to recapitulate again here that a conviction for a serious offence is not a condition for a conviction for an offence of money laundering under s. 4(1) of AMLATFA as provided under s. 4(4) of AMLATFA. The Federal Court in *Raqeem Rizqin Enterprise* (*supra*) had reiterated the law as follows:

[28] *Kesalahan penggubahan wang haram tidak bergantung kepada terdapatnya sabitan berkenaan dengan suatu kesalahan berat atau kesalahan berat asing atau pendakwaan telah dimulakan bagi kesalahan-kesalahan tersebut untuk mensabitkan seseorang dengan kesalahan pengubahan wang haram* (lihat sub-s. 4(4)). (emphasis added)

[44] Reverting to the facts in the present case, the prosecution's main witnesses to prove the proceeds of unlawful activity received by the appellant were SP18 and SP19.

[45] SP18 in essence testified that he was an illegal lottery operator in Batu Pahat, Johor for about ten years. SP18 has known the appellant since 2009 and had paid the appellant RM3,000 per month for four years. The payments were made by putting the monies in the appellant's house letterbox. The payments were to ensure that no action was taken against SP18's illegal lottery business. SP18 further testified that from 2009 until 2015, SP18 was never arrested for operating the illegal gambling business.

[46] Further, SP19 in his testimony said that he operated an illegal gambling business in Batu Pahat from 2006 until 2015. SP19 also had paid RM3,000 to the appellant sometimes every month and sometimes once in two months. The monies were also put in the appellant's house letterbox. These payments were made for a period of three years to ensure that no action was taken against SP19's illegal gambling business.

[47] In the light of SP18 and SP19 evidence, the following evidence adduced by the prosecution is pertinent to note.

[48] From 1 September 2009 until 3 September 2012, the appellant was placed at the Prevention of Gambling, Vice and Gangsterism Division, IPD Batu Pahat. The appellant was then transferred to the Intelligence/Operation Division, IPD Batu Pahat. The appellant also had acted as Batu Pahat Head of Criminal Investigation Division from 5 April 2013 until 31 May 2013 and 3 June 2013 until 30 June 2013. On 28 December 2015, the appellant was transferred to the Special Task Force on Organised Crime, Bukit Aman, Kuala Lumpur.

[49] The position held by the appellant from 2009 until 2015, that was in charge *inter alia* of the prevention of gambling and criminal investigation in IPD Batu Pahat coincides with the period of the payments of monies made by SP18 and SP19 to the appellant. Payments were stopped when the appellant was transferred to Bukit Aman, Kuala Lumpur in 2015. This supported the evidence of SP18 and SP19 that the payments were to ensure that no action was taken by the police against both SP18 and SP19 illegal gambling business as the appellant was in the position to do so.

[50] The next significant piece of evidence is the discovery and seizure of cash monies by officers of the Malaysian Anti-Corruption Agency in the total amount of RM1,270,366 and Rupiah 8,178,000 in several plastic bags and boxes found in the closet of the appellant's master bedroom and the house. Taking into account that the appellant's monthly income as a police officer at the material time was about RM6,000 to RM8,000 and the appellant had

no other business or played shares with Bursa Malaysia, it is a reasonable inference that the monies found in the appellant's house were monies among others, from SP18 and SP19.

[51] On the totality of evidence and the balance of probabilities, we find the High Court Judge was correct in his finding that the monies seized in the appellant's house which was the basis of the eighth charge, and the monies used to buy insurance and investment plan as stipulated in the first to seventh charges were proceeds of unlawful activity. SP15 had given detailed particulars about the insurance and investment plan made by the appellant involving a large sum of money which was paid cash by the appellant.

[52] The dates the appellant bought the insurance and the investment plan as stated in the seven charges were 4 September 2014, 4 September 2014, 16 December 2014, 16 December 2014, 26 February 2015, 8 October 2015, and 28 December 2015. The dates were after SP18 and SP19 started paying the bribe monies to the appellant which was in 2009 until 2015. This fact shows the connection between the monies from the unlawful activity and the insurance and investment plan buying.

[53] In the instant case, an inference could also be made, as provided under s. 4(2)(a) of AMLATFA, that in the objective factual circumstances of the present case, the appellant knows that the monies in the house and which were used for the insurance plan and investment were proceeds of unlawful activity. Further, the appellant, without reasonable excuse had failed to take reasonable steps to ascertain that the monies were not proceeds of unlawful activity as envisaged under s. 4(2)(b) of AMLATFA.

[54] In connection to this, the reference to the repealed s. 3(aa) and (bb) by the High Court Judge does not prejudice or cause any miscarriage of justice to the appellant as in substance, s. 4(2)(a) and (b) which is applicable at the material time, is similar with the repealed s. 3(aa) and (bb).

[55] Section 3(aa) and (bb) were repealed on 8 August 2014 and replaced with s. 4(2)(a) and (b) and for easy reference s. 3(aa), (bb) and 4(2)(a) and (b) are as follows:

Section 3(aa) and (bb)

where:

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

Section 4(2)(a) and (b)

(2) For the purposes of subsection (1), it may be inferred from any objective factual circumstances that:

(a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or

(b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

[56] In relation to the evidence of SP18 and SP19, counsel for the appellant submitted that evidence shows that the monies were placed in the letterbox of the appellant's house and there was no evidence to show that the monies were given or received by the appellant. In this regard, the totality of the evidence in the present case must be analysed. Here, the payments made were not once or twice but for a period of three to four years every month. The monies were not placed in other people's house letterboxes but the appellant who was in the position to ensure no action to be taken against SP18 and SP19's illegal gambling businesses.

[57] Having perused the totality evidence of SP18 and SP19, it established the pertinent facts that the monies were for the appellant not to take any action against their illegal gambling business. The evidence of these witnesses *inter alia* are as follows:

SP18

S: Boleh kamu ceritakan apa sebab kamu kenal Ismail?
J: Saya kawan dengan dia.

S: Kawan macam mana?
J: Minta tak mahu kacau saya lah.

S: Apa maksud kamu tak mahu kacau?
J: Tak mahu tangkap saya lah.

S: Untuk tak mahu dia kacau sama kamu, apa kamu buat?
J: Bagi wang.

S: Boleh saya tahu berapa wang kamu bagi sama dia?
J: RM3000.

S: Bagi macam mana itu boleh beritahu?
J: Bagi taruk dia punya rumah itu peti surat.

…

S: Berapa lama kamu bagi itu RM3000?
J: Tak ingat.

S: Lebih kurang tahun?
J: 4 tahun.

SP19

S: Tadi kamu kata kamu ada buat bisnes loteri haram, Tuan Ismail duduk di group 7 IPD Batu Pahat, kenapa kamu nak berkawan dengan dia?
J: Kerana OKT bertugas di dalam group 7 berkaitan dengan judi dan saya takut oleh itu saya ingin berkawan dengan dia.

S: Kamu takut apa?
J: Ditangkap.

S: Sebab?
J: Kerana buat loteri haram.

S: Kamu kata pergi rumah ada bawa barang, barang apa ya?
J: Duit dalam sampul.

S: Berapa banyak?
J: RM3000.

S: Lepas itu?
J: Lepas itu saya letak dalam pos box OKT dan lepas itu saya balik.

S: Selain kali pertama itu ada tidak bagi duit lain kepada OKT?
J: Kadang-kadang satu bulan atau 2 bulan sekali akan bagi duit dalam sampul dan letak dalam pos box rumah OKT.

S: Setiap kali kami bagi berapa jumlah wang?
J: RM3000.

S: Boleh beritahu kenapa RM3000 bukan jumlah lain?
J: Kerana kali pertama saya bagi RM3000 oleh itu kemudiannya semua RM3000.

S: Kamu bagi RM3000 ini berjalan selama berapa tahun?
J: Lebih kurang 2 hingga 3 tahun.

[58] Counsel for the appellant also raised issues that the appellant refused to be SP19's friend and the monies sometimes were placed in the appellant's letterbox by SP19's workers. We find that these facts do not affect the material fact that the appellant had received bribe monies from SP18 and SP19, a serious offence under Second Schedule of AMLATFA. The use and the possession of these bribe monies are the subject matter of the charges of money laundering against the appellant.

The Appellant's Defence

[59] Now we move to the appellant's defence which said that the monies used for investments at MAA Takaful Berhad and the monies seized from the appellant's house are from the following sources:

(i) a loan in a total sum of RM3 million from SD5;

(ii) a loan of RM250,000 from SP26.

(iii) the appellant's own money; and

(iv) proceeds from the sale of oil palm by the appellant's wife in the sum of RM100,000.

[60] As regards the RM3 million loan from SD5, the facts revealed that this big sum of the loan was without any security or interest and the loan agreement (D54) was signed eight years after the purported oral agreement of the said loan and after two months the appellant was charged in court for the present case. Further, the loan was given by SD5 between 2005 to 2009 but the investment with MAA Takaful was made from 2014 to 2017 which was eight years after the loan was given to the appellant. As such we agree with the High Court Judge that this defence was an afterthought.

[61] It is also unreasonable for SP26 to give a loan of RM250,000 to the appellant by withdrawing his EPF monies just because he was afraid that the appellant, as a police officer may cause problems to him. SP26 evidence *inter alia* are as follow:

S: Dalam keterangan kamu tadi pada 8/10/2015 kamu keluarkan duit EPF kamu dan bagi pada OKT pinjam RM250,000 betul?

J: Betul

S: Kenapa kamu sanggup keluarkan duit EPF kamu dan serahkan kepada OKT yang mana dia hanya rakan biasa kamu?

J: Dia bulan 4, 5 tahun 2014 dia selalu telefon jadi saya pun sebagai niaga punya orang dan dia kakitangan awam saya takut akan menyinggung perasaan dia. Saya takut dia susahkan saya kalau saya sakitkan hati dia.

[62] As cash monies of RM1,270,366 and Rupiah 8,178,000 were found and seized from the appellant's house, the defence that the monies include the appellant's own money and the proceeds of the sale of palm oil in the sum of RM100,000 does not support the appellant's defence that the monies seized were not proceeds of unlawful activity.

[63] Firstly, the appellant's salary as a police officer was only about RM6,000 to RM8,000 per month and paid into his account. As such, it is difficult to imagine that the appellant could accumulate a large sum of money in cash and placed it in several plastic bags and boxes in his closet. Further, the receipt for the sale of the palm oil shown in court was only in the sum of RM11,655.95. Thus, it does not explain a large amount of cash monies in the appellant's house.

[64] We should also not lose sight of the definition of "proceeds of an unlawful activity" under s. 3 of AMLATFA as alluded to earlier, which is either wholly or partly obtained from any unlawful activity.

[65] In the circumstances and on the totality of the evidence before the court, we agree with the decision of the High Court that the defence had failed to raise any reasonable doubt in the prosecution case, and consequently, the prosecution had proved its case beyond a reasonable doubt.

Whether The Charges Against The Appellant Are Defective

[66] The next issue raised by counsel for the appellant was that the charges against the appellant are defective. It was submitted that the charges did not state the details in regard to the method of how the offence was committed under s. 4(1). As such, it was contended that it contravened the provision of ss. 152 and 154 of the Criminal Procedure Code ("the CPC").

[67] For easy reference ss. 152 and 154 of the CPC states:

Section 152

Form of charge 152.

(1) Every charge under this Code shall state the offence with which the accused is charged;

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only;

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged;

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge;

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case;

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

Section 154

154. When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[68] Reverting to the present case, the charges against the appellant concern the offences of money laundering under s. 4(1) of AMLATFA. The ingredients of the offences as mentioned earlier are the use of the proceeds of unlawful activity as for the first to seventh charges and the possession of the proceeds of the unlawful activity for the eighth charge. In this regard, all the required ingredients of the offences were stated in the charges. Thus, we find there was no omission of particulars in the charges as contended by counsel for the appellant. The requirements under ss. 152 and 154 of the CPC had been complied with.

[69] Further, even if there was an error or omission in the charges, perusing the defence forwarded by the appellant in this case, it was not shown that the appellant was misled by the charges proffered against him. Here, s. 156 of the CPC provides:

> **Effect of errors**
>
> 156. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material **unless the accused was in fact misled by that error or omission.**
>
> (emphasis added)

[70] On this issue, it is useful to make reference to the Federal Court case of *Mohd Khir Toyo v. PP* [2015] 8 CLJ 769 where Jeffrey Tan FCJ explained as follows:

> [56] The instant charge clearly stated (i) that the appellant as a public servant (ii) accepted a valuable thing for himself and his wife (iii) for a consideration which he knew to be inadequate (iv) from SP2 whom he knew had connections with his official work. It was plain as a pikestaff that **all required ingredients of the offence were stated. There was no error or omission in the ingredients of the charge.** If at all, it would only be an error or omission in the particulars of the offence. The particulars of the offence were those portions of the charge without emphasis.
>
> …
>
> [59] There was no error or omission in the ingredients and or particulars of the offence. There was no defect in the charge. **In any case, it was not shown that the appellant was materially misled. It was also not shown that a miscarriage of justice had been occasioned,** for it was open to the appellant, but which the appellant wholly eschewed, to cross-examine SP2 and or to call his witnesses, including himself, to testify on the approvals given to the companies of SP2. The challenge to the charge must therefore fail. (emphasis added)

[71] In the circumstances, we are of the view that the appellant's contention in regard to the defective charges is bereft of any merit.

Whether Adverse Inference Under s. 114(g) Of The Evidence Act 1950 Is Applicable Against The Prosecution For Non-calling Of SP19's Employees

[72] It is trite law that adverse inference under s. 114(g) triggers when parties failed to call a material witness or withheld material evidence. If there is sufficient evidence proving a fact, the non-calling of a witness to prove the same fact is not fatal. (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 (SC), *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 (SC)).

[73] In the present case, the evidence of SP19 revealed that besides himself, sometimes the payments of RM3,000 to the appellant were placed in the appellant's house letterbox by his workers. Here, what is important is that payments of monies had been made to the appellant to ensure no action was taken against the illegal gambling activity operated by SP19. This fact was established by the evidence of SP18 and SP19. Thus, the ingredient of proceeds of unlawful activity had been proved by the prosecution and there is no gap in the prosecution case. Therefore, we find s. 114(g) is not applicable against the prosecution based on facts in the present case.

[74] On the totality of the evidence, it is our unanimous decision that the convictions of the appellant for all the charges are safe. We, therefore, dismiss the appellant's appeal on convictions and affirmed the decision of the High Court.

Appeals On The Sentence By Both The Appellant And The Prosecution

[75] The maximum sentence for a money laundering offence under AMLATFA is 15 years and is also liable to a fine. Section 4(1) of AMLATFA provides as follows:

> *Any person who:*
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> *Commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity* or instrumentalities of an offence at the time the offence was committed *or five million ringgit, whichever is the higher.* (emphasis added)

[76] Apart from this, s. 55(2) of AMLATFA is a provision that allows the court to impose a penalty on the accused if the property of the unlawful activity has been disposed of, diminished in value, or cannot be traced. The provision states:

A (2) Where the offence is proved against the accused but the property referred to in subsection (1) **has been disposed of, diminished in value or cannot be traced,** the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a civil debt due to the Government of Malaysia and shall not be subject to any period of
B limitation prescribed by any written law. (emphasis added)

[77] The High Court Judge upon convicting the appellant on all the charges against him had meted a sentence of four years imprisonment for each of the charges and the sentence of imprisonment shall run concurrently. The High Court further ordered that the movable property seized, in this case, be
C forfeited to the Government of Malaysia.

[78] Counsel for the appellant submitted that the imprisonment sentence is too excessive and the High Court Judge had failed to consider the mitigation factors and the principles of law in sentencing the appellant.

D **[79]** Conversely, the respondent contended that the High Court Judge erred in imposing the imprisonment sentence to run concurrently for all the charges as some charges involved different transactions and does not fulfil the "one transaction rule".

[80] Further, the respondent submitted that the High Court Judge erred in
E not imposing the mandatory fine under s. 4(1) of AMLATFA.

[81] On this issue of sentencing, before the High Court, the mitigating factors advanced by the appellant are as follows:

(i) the appellant was 57 years of age on the date he was convicted;

F (ii) the appellant is married and has two children, one of whom is still in school;

(iii) the appellant is the breadwinner of the appellant's family;

(v) the appellant has heart disease;

G (vi) the appellant has served the Royal Malaysia Police for over 38 years;

(vii) the appellant maintained good performance and behaviour during his period of service with the Royal Malaysia Police;

(viii) The appellant has given full cooperation to the Malaysian Anti-Corruption Agency and had not shown any inclination to evade any
H Court proceedings.

[82] It is trite law that in passing sentence, the court should balance between the interest of the accused and the public. However, the public interest is the paramount consideration. (*PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256). Further, a serious offence has an impact on
I sentencing. (*Christopher Khoo Ewe Cheng v. PP* [1998] 3 CLJ 705; [1998] 3 MLJ 881).

[83] We noted the mitigating factors submitted by the counsel for the appellant and at the same time, we also take into consideration the fact that a huge amount of proceeds of unlawful activity involved in the present case which is a total sum of RM3,350,049.37, and the seriousness of the offence of money laundering. The appellant, a police officer, who was entrusted to uphold the law had betrayed the trust expected of him and protected illegal gambling operators in consideration for bribe monies. Public interest demands the appellant's conduct to be put a stop to, in order to gain the public trust. This can be achieved by a deterrent sentence, not only as a lesson to the appellant but also for others, especially enforcement officers, not to commit the same offence.

[84] On the issue of whether all the sentences should run concurrently or consecutively, it is instructive to make reference to the Court of Appeal case of *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572 where the relevant principles of law were explained as follows:

> The combined effect of s. 282 and s. 292 is that unless the court imposing a sentence says anything to the contrary, the sentence runs from the date on which it was passed (see *Ooi Sim Yim v. PP* [1990] 1 CLJ 435; [1990] 1 CLJ (Rep) 223). The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. *In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see R v. Saleem [1964] Crim LR 482; R v. Walsh [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design* (see *Jayaraman & Ors v. PP* [1979] 1 LNS 36; [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] 1 LNS 17; [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p. 83:
>
> > The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.
>
> *In explaining the totality principle* his Lordship referred (at p. 85) to the view of DA Thomas in *Principles of Sentencing*, 2nd edn at pp. 57-58:

A

> The many decisions of the court in which the totality principle has been applied to explain the reduction of a cumulative sentence made up of correctly calculated individual parts suggest that the principle has two limbs. *A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects.*

B

In this regard reference is also made to *Emmins on Sentencing*, 2nd edn, p. 151:

C

> *It is well established that sentences must have regard to the total length of sentence passed, particularly where consecutive sentences have been imposed, to ensure that the sentence properly reflects the overall seriousness of the behaviour.* (emphasis added)

[85] The same principle of law was discussed by this court in *Azmi Osman v. PP* (*supra*) where this was said:

D

> [67] After hearing submissions by both parties on sentencing, *we are of the view that the learned SCJ had erred when she applied the "same transaction" principle in passing sentence for the four charges. The facts relating to the four charges clearly do not justify such invocation of the said principle by the learned SCJ. The essential element of proximity of time was clearly absent. The four offences were committed during a period covering 2002 to 2005.*

E

> [68] Though the interest of the accused person must be taken into account when passing sentence, the interest of the public is however paramount, especially bearing in mind the fact that the accused was occupying a position of trust when he committed those offences. He was a Deputy Superintendent of Police in charge of combating vice activities, such as illegal gambling and prostitution. Instead he abused his position and obtained illegal gains.

F

> [69] In passing sentence, this court has a duty to reflect public abhorrence against the acts committed by the accused person. A sentence of a deterrent nature needs to be meted out, to drive home the point that crime does not pay.

G

> [70] *In the circumstances, we impose a sentence of two years imprisonment for each offence, and then four sentences shall run consecutively.* To our mind, this sentence reflects the magnitude of the charges and the seriousness of the offences committed by the accused person. The orders of the learned SCJ on sentences are therefore, set aside. (emphasis added)

H

[86] Applying the one transaction rule discussed above, we find, the first and second charges, where both offences were committed on 4 September 2014, and the third and fourth charges where the offences were committed on 16 December 2014 fulfil the requirement of the proximity of time to be considered as the same transaction. However, the rest of the charges were committed on different dates and as such without the essential elements of the proximity of time.

I

[87] Further, we find, the High Court Judge erred in failing to impose any fine as required under s. 4(1) of AMLATFA. The words "and shall also be liable to a fine" connotes its mandatory application. The position is different before the amendment to s. 4(1), where the sentence of the fine was the discretion of the court when the word "or" was used. The repealed s. 4(1) was as follows:

> 4(1) Any person who:
>
> (a) Engages in, or attempts to engage in; or
>
> (b) Abets the commission of,
>
> Money laundering, commits an offence, and **shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.** (emphasis added)

[88] The existing law as regards the sentence for money laundering offence as alluded to earlier and for easy reference is as follows:

> … **shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity** or instrumentalities of an offence at the time the offence was committed **or five million ringgit, whichever is the higher.** (emphasis added)

[89] The fine to be imposed pursuant to this provision is not less than five times the value of the proceeds of the unlawful activity or instrumentalities of the offence or five million ringgit, whichever is the higher. Here the words "or five million ringgit, whichever is the higher" means that the minimum sentence of fine for money laundering under s. 4(1) is RM5 million.

[90] Likewise, under s. 24 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") which provides the sentence of imprisonment and a mandatory sentence of fine as follows:

> 24(1) **Any person who commits an offence** under sections 16, 17, 20, 21, 22, and 23 **shall on conviction be liable to:**
>
> (a) imprisonment for a term not exceeding twenty years; **and**
>
> (b) **a fine of not less than five times the sum or value of the gratification** which is the subject matter of the offence, where such gratification is capable of being valued or is of a pecuniary nature, **or ten thousand ringgit, whichever is the higher.**
>
> (2) Any person who commits an offence under section 18 **shall on conviction be liable to:**
>
> (a) imprisonment for a term not exceeding twenty years; and
>
> (b) **a fine of not less than five times the sum or value of the false or erroneous or defective material particular,** where such false or erroneous or defective material particular is capable of being valued, or of a pecuniary nature, **or ten thousand ringgit, whichever is the higher.** (emphasis added)

[91] In relation to this, the court in strings of cases had decided that the minimum fine under s. 24 of the MACC Act is RM10,000 taking into account the words "or ten thousand ringgit, whichever is the higher".

[92] Having considered all factors in the present case, including the principles of sentencing, we substitute the sentence imposed by the High Court with the following:

(i) **1st charge**

1 year imprisonment and a fine of RM5 million and in default, 6 months imprisonment;

(ii) **2nd charge**

1 year imprisonment and a fine of RM5 million and in default 6 months imprisonment;

(iii) **3rd charge**

1 year imprisonment and a fine of RM5 million and in default, 6 months imprisonment;

(iv) **4th charge**

2 years imprisonment and a fine of RM5 million in default, 6 months imprisonment;

(v) **5th charge**

2 years imprisonment and a fine of RM5 million and in default, 6 months imprisonment;

(vi) **6th charge**

2 years imprisonment and a fine of RM5 million and in default 6 months imprisonment;

(vii) **7th charge**

1 year imprisonment and a fine of RM5 million and in default, 6 months imprisonment;

(viii) **8th charge**

2 years imprisonment, and a fine of RM7 million in default 6 months imprisonment.

[93] We further ordered that the sentence of imprisonment for the first and the second charges run concurrently, the imprisonment sentence of the third and fourth charges, run concurrently but consecutively from imprisonment sentence for the first and the second charges, and all other imprisonment sentences for the fifth, sixth, seventh, and eighth charges are to run consecutively of each other and from the imprisonment sentence for the third and fourth charges.

[94] Here, we are of the considered view that the totality of the sentence meted out against the appellant reflects the seriousness of the offence committed by the appellant in the present case.

[95] We also find that there is no special circumstance in the present case for the High Court to grant the stay of the forfeiture of the appellant's seized property.

Conclusion

[96] In conclusion, our unanimous decision is as follows:

(i) The Appeal No. J-06A-7-2020 by the Public Prosecutor against the decision of the High Court in granting the stay of the forfeiture of the appellant's seized property to the Government of Malaysia is allowed.

(ii) The Appeal No. J-06B-31-07-2020 by Mohd Ismail bin Syed Merah against the order of the High Court in granting the forfeiture order of the appellant's seized property to the Government of Malaysia is dismissed and the decision of the High Court is affirmed.

(iii) The Appeal No. J-06B-32-07-2020 by Mohd Ismail bin Syed Merah against the conviction and sentence by the High Court is dismissed and the decision of the High Court is affirmed.

(iv) The Appeal No. J-06B(H)-33-07-2020 by the Public Prosecutor against the sentence is allowed and the decision of the High Court on sentence is set aside.